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Opinion on remand from Supreme Court

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER CANON, Defendant and Appellant.	A133342 (S.F. City & County Super. Ct. No. 209815)

Christopher Canon appeals from a judgment upon a jury verdict finding him guilty of second degree murder (Pen. Code,[1] 187). The jury also found true the allegation that defendant personally discharged a firearm causing great bodily injury and death (§ 12022.53, subd. (d)). In a separate court trial, the court found defendant guilty of assault on a peace officer with force likely to cause great bodily injury (§ 245, subd. (c)) and assault with force likely to cause great bodily injury (§ 245, subd. (a)). Defendant contends that the trial court erred in instructing the jury on manslaughter and that the trial court's imposition of a 49-years-to-life term constitutes a de facto term of life imprisonment without parole (LWOP) in violation of the Eighth Amendment.

In our original opinion, filed September 30, 2014, a different panel of this court affirmed defendant's convictions but concluded that defendant's sentence was in effect the functional equivalent of an LWOP term (*People v. Caballero* (2012) 55 Cal.4th 262,

[1] All undesignated statutory references are to the Penal Code.

268 (*Caballero*)), and thus deprived him of a meaningful opportunity for parole in violation of the Eighth Amendment to the United States Constitution as interpreted in *Graham v. Florida* (2010) 560 U.S. 48, 74 (*Graham*) and *Miller v. Alabama* (2012) 567 U.S. 460, 465 [132 S.Ct. 2455, 2460] (*Miller*). We therefore remanded the matter for resentencing.

Subsequently, our Supreme Court granted defendant's petition for review and deferred further action "pending consideration and disposition of a related issue in *In re Alatriste*, S214652, *In re Bonilla*, S214960, and *People v. Franklin*, S217699 (see Cal. Rules of Court, rule 8.512(d)(2)), or pending further order of the court." (*People v. Canon* (Dec. 17, 2014, No. S222473 [2014 Cal. LEXIS 11405, at *1].)

On August 17, 2016, our Supreme Court filed another order transferring this matter to this court "with directions to vacate [the September 30, 2014] decision and reconsider the cause in light of *People v. Franklin* (2016) 63 Cal.4th 261, 283–284 [(*Franklin*)]. (Cal. Rules of Court, rule 8.528(d).)" (*People v. Canon* (Aug. 17, 2016, No. S222473 [2016 Cal. LEXIS 6814, at *1].)

In this opinion, we repeat nearly verbatim the portions of the September 30, 2014 decision setting forth the facts of this case and rejecting defendant's contention that his conviction should be reversed because the trial court committed instructional error. We then conclude that defendant's challenge to the length of his sentence is moot because he now has a statutory right to become eligible for parole after serving no more than 25 years of his sentence. (*Franklin*, *supra*, 63 Cal.4th 261.) Finally, we conclude defendant is not entitled to a hearing regarding his fitness to be tried as an adult. We shall affirm the judgment, but, in accordance with *Franklin*, shall remand the matter to the trial court for the limited purpose of determining whether defendant has had an adequate opportunity to make a record of mitigating evidence that will be relevant at a future youth offender parole hearing.

I. FACTS

A. The Murder

On November 11, 2007, Michael Price, Jr., age 18, and his cousins, Kiengi White and Karesha Goodman drove from Oakland to San Francisco to meet with three friends. They met their friends in downtown San Francisco and the group went to the Metreon where they played some video games in the arcade on the second floor. They arrived at the Metreon at approximately 6:00 p.m. About an hour later, they decided to leave and took the escalator to the exit. Price and White followed the others down the escalator. When White and Goodman stepped off the escalator on the first floor, they heard Price's voice. White turned around and saw defendant and another boy approach Price. White walked toward them. White heard defendant tell Price, "I'll pop you" two or three times. White told defendant, "Go on with all that," meaning "just leave it alone." Defendant had his right hand in the crotch area of his pants.

Price and White walked away toward the exit of the Metreon. Price had to use the bathroom so they stopped near the Sony PlayStation area to find one. Defendant walked by and asked Price, "You want to take it outside?" Price responded, "We can throw them if you want to throw them," meaning "we can fist fight." Defendant again said, "I'll pop you" about three times. Defendant then fired a gun, shooting Price. White heard four gunshots. Price fell to the ground; White saw defendant and his friend run out of the entrance of the Metreon. Goodman also heard Price arguing with someone. She heard Price say, "you want to . . . you want to just fight," and heard another voice say, "I'll pop you." She walked back towards Price and saw that he was arguing with defendant. Price took off his jacket, and defendant pulled his gun and started shooting him. Goodman heard three or four shots.

White went to Price's aid and tried to call 911. He was unable to get through to 911, but a police officer responded to the scene within about a minute. Price died as a result of multiple gunshot wounds.

Several other people at the Metreon observed or heard the altercation and shooting. A security videotape from the Metreon depicting the scene of the shooting and showing defendant and Price was played for the jury.

Sergeant Henry Yee was directing traffic at the corner of Fourth and Mission Streets on the evening of the shooting. At approximately 7:00 p.m., he heard several gunshots coming from the Metreon. He immediately ran to the Metreon where he found Price on the ground. He also saw several shell casings near Price's body. Yee summoned an ambulance.

In the meantime, Captain Daniel McDonagh was also working near the Metreon when he saw defendant running on Mission Street with a gun in his left hand. McDonagh pursued defendant, who raised his gun and pointed it at McDonagh's body. Defendant turned onto Jessie Alley and ran into the Bloomingdale's store. McDonagh continued to chase defendant, and radioed his location. Once defendant exited from the store onto Mission Street, other officers were able to apprehend him. The police located a firearm at the northwest corner of Fourth and Mission Streets. McDonagh testified that the gun was similar to the weapon he saw in defendant's possession. A criminalist testified that the gun found by the police fired the four cartridge casings that were located at the scene.[2]

Inspector John Cleary interviewed defendant at about 11:50 p.m. on the evening of his arrest.[3] A videotape of the interview was played for the jury. Although defendant initially explained that the shooting had happened behind him as he was walking in the Metreon, he subsequently admitted that he got into an argument with Price because Price was walking too slow on the escalator. Price said, "Man, I'll whip your ass." Defendant shot Price two or three times.

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[2] The police also found a pocket knife and some clothing at the scene. White identified the knife as belonging to Price. He testified, however, that he did not see Price with the knife on the day of the shooting.

[3] Defendant was then 15 years old.

Dr. Amanda Gregory testified on behalf of the defense as an expert in clinical neuropsychology. She opined that the adolescent brain is not fully developed, particularly in the areas of higher level cognitive functions such as judgment, reasoning, impulse control, and considering the consequences of behavior. Dr. Gregory examined defendant when he was almost 18 years of age and found that he had no evident brain deficits and his cognitive abilities were within the average range.

B. The Assaults

1. Assault on a peace officer

At about 10:50 a.m. on April 6, 2008, John Zerbe was working as a counselor and peace officer at the Juvenile Justice Center in San Francisco (JJC). Defendant was in Unit 7 and was using the telephone during his morning recreational time. Defendant ended his call after about seven to eight minutes and approached Officer Jesse Aguilar at the counselor's desk and told him that he had been disconnected and wanted to call again to complete the conversation. Aguilar refused to allow defendant to make another call because defendant wanted to call a number that was not on the approved list. Defendant became upset and agitated.

Zerbe approached defendant and asked him to sit down at one of the dining tables. Defendant sat down and told Zerbe that he was upset about not being able to make his phone call. Zerbe told him that he would talk with Aguilar. While Zerbe was talking with Aguilar, defendant got up from the table and moved closer to the counselor's desk. Zerbe told defendant to sit down. He was hoping to diffuse the situation, but defendant continued to walk around. Zerbe then directed defendant and the rest of the detainees to return to their rooms. When Zerbe looked toward the group of detainees that was beginning to move toward their rooms, defendant lunged toward him and punched him in the left side of his face. The punch fractured Zerbe's upper molar and caused a jaw contusion. Zerbe was unable to eat solid foods for a couple of days and his jaw was sore for one to two weeks. He was on medical leave for 18 days as a result of the injury.

2. Assault with force likely to cause great bodily injury

On January 5, 2009, Reginald Cooks was working as a counselor at the JJC. He was in the gym with about 12 detainees including defendant. After the detainees played flag footfall, one of the detainees punched another detainee in the face. The victim fell to the ground and appeared unconscious. Cooks pulled the perpetrator away but as he did so, defendant began punching the victim in the face. Defendant punched the victim three to four times. The victim was bleeding from the mouth and had a laceration on his upper lip. Medical personnel responded and the victim regained consciousness.

II. DISCUSSION

A. Manslaughter Instruction

The trial court instructed the jury on first and second degree murder as well as the lesser offense of voluntary manslaughter. The court instructed on voluntary manslaughter in accordance with CALCRIM No. 570.[4] During deliberations, the jury asked the court for a definition of the term, "average disposition." After conferring with

[4] In pertinent part, CALCRIM No. 570 provides as follows: "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion. [¶] The defendant killed someone because of a sudden quarrel or in the heat of passion if: [¶] 1. The defendant was provoked; [¶] 2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured [his] reasoning or judgment; AND [¶] 3. The provocation would have caused a person of *average disposition* to act rashly and without due deliberation, that is, from passion rather than from judgment. [¶] . . . [¶] It is not enough that the defendant simply was provoked. The defendant is not allowed to set up [his] own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of *average disposition*, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment." (Italics added.) Our Supreme Court recently approved CALCRIM No. 570, noting that "[t]elling the jury to consider how a person of average disposition 'would react' properly draws the jury's attention to the objective nature of the standard and the effect the provocation would have on such a person's state of mind." (*People v. Beltran* (2013) 56 Cal.4th 935, 954.)

counsel, the court responded, "In response to your question re: CALCRIM 570 'a person of average disposition . . .' please refer to CALCRIM 200."[5]

Defendant contends that the trial court erred in failing to instruct the jury that it could consider youth in its analysis of whether a person of average disposition would have been sufficiently provoked as a result of a sudden quarrel or heat of passion. We need not decide the substantive merits of this issue because we conclude that the evidence fails to show that defendant was sufficiently provoked regardless of his age. Accordingly, any instructional error was harmless.[6]

"Heat of passion arises when 'at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.' [Citation.]" (*People v. Barton* (1995) 12 Cal.4th 186, 201.) " 'The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim. [Citations.] The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection.' [Citations.]" (*People v. Moye* (2009) 47 Cal.4th 537, 549–550.) "To be adequate, the provocation must be one that would cause an emotion so intense that an ordinary person would simply *react*, without reflection." (*People v. Beltran, supra,* 56 Cal.4th at p. 949.) Whether the provocation was adequate is determined by an objective test. (*Id.* at p. 950; *People v. Lee*

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[5] In relevant part, CALCRIM No. 200 provides, "[s]ome words or phrases used during this trial have legal meanings that are different from their meanings in everyday use. These words and phrases will be specifically defined in these instructions . . . . Words and phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meanings."

[6] For the same reason, we need not decide whether defendant waived the issue or invited the error when he requested that the jury be instructed pursuant to CALCRIM No. 200.

(1999) 20 Cal.4th 47, 60.) "The provocation must be such that an average, sober person would be so inflamed that he or she would lose reason and judgment. Adequate provocation and heat of passion must be affirmatively demonstrated." (*Lee, supra,* 20 Cal.4th at p. 60.)

Here, the evidence fails to demonstrate that defendant was sufficiently provoked to react without reflection based on his altercation with Price. As the Attorney General points out, defendant's annoyance that Price was moving too slowly on the escalator would not have caused a reasonable person—whether an adult or a teenager—to be so inflamed as to lose all reason and judgment. While an argument between defendant and Price ensued with name-calling, and mutual invitations to fight outside, Price's conduct was insufficiently provocative to incite an ordinary person of average disposition to act rashly or without due deliberation and reflection. (See *People v. Najera* (2006) 138 Cal.App.4th 212, 226 and fn. 2 [victim's name-calling and pushing of the defendant to the ground insufficiently provocative under an objective standard to cause an ordinary person of average disposition to act rashly or without due deliberation]; *People v. Johnston* (2003) 113 Cal.App.4th 1299, 1303, 1313 [defendant who provokes a fight by taunts and threats of violence is not entitled to claim provocation when the victim responds by engaging in a fight].) In this case, Price's taunts to "throw them" or "just fight" were so slight that a reasonable person of any age would not have acted rashly or without due deliberation. There was simply insufficient evidence that Price provoked defendant to react in a heat of passion. Hence, even if the trial court erred in its instructions to the jury on the issue, the error was harmless. (See *People v. Beltran, supra,* 56 Cal.4th at pp. 955–956 [*Watson*[7] standard of harmless error applies to issues concerning misdirection of the jury]; *People v. Breverman* (1998) 19 Cal.4th 142, 177–178 [same].) It is not reasonably probable that defendant would have obtained a more favorable verdict absent any instructional error. (*Watson, supra,* 46 Cal.2d at p. 836.)

[7] *People v. Watson* (1956) 46 Cal.2d 818, 836.

B. Sentencing

The trial court sentenced defendant to the mandatory indeterminate term of 15 years to life on the second degree murder count plus an additional mandatory term of 25 years to life for the gun enhancement, for a total indeterminate term of 40 years to life. In addition, the court imposed a determinate term of five years on the assault upon a peace officer offense plus an additional term of three years for the great bodily injury enhancement, and a consecutive one-year term on the second assault offense, for a total term of 49 years to life in state prison. Defendant contends that the sentence imposed violates the Eighth Amendment because the trial court failed to consider the mitigating circumstances of his youth and background as required by *Miller, supra*, 567 U.S. at pp. 477-480 [132 S.Ct. at pp. 2468–2469].

In *Graham, supra*, 560 U.S. at p. 74, the United States Supreme Court held that the Eighth Amendment prohibits states from sentencing a juvenile convicted of nonhomicide offenses to life imprisonment without the possibility of parole. The Court mandated that juvenile offenders must be given "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (*Id.* at p. 75.) The Court noted that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence. [Citations.] Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults. [Citation.] It remains true that '[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.' " (*Id.* at p. 68.) The Court therefore concluded that an LWOP sentence was "not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability." (*Id.* at p. 74.)

In *Miller, supra*, 567 U.S. at p. 465 [132 S.Ct. at p. 2460], the United States Supreme Court applied the reasoning of *Graham* to homicide cases, holding that mandatory LWOP sentences for juveniles violate the Eighth Amendment's prohibition on

cruel and unusual punishment. Although the court did not foreclose a court's ability to impose an LWOP term on " 'the rare juvenile offender whose crime reflects irreparable corruption,' " the Court required that courts "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." (*Id.* at pp. 479-480 [132 S.Ct. at p. 2469], citations and footnote omitted.) The court recognized that "[m]andatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys." (*Id.* at pp. 477-478 [132 S.Ct. at p. 2468].)

In *Caballero, supra*, 55 Cal.4th at p. 265, our Supreme Court addressed the applicability of *Graham* and *Miller* to a juvenile convicted of nonhomicide offenses and sentenced to a 110 years to life term. The *Caballero* court held that "sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment." (*Id.* at p. 268.) The court determined that a "term-of-years sentence that amounts to the functional equivalent of a life without parole sentence" constitutes cruel and unusual punishment. (*Id.* at p. 268.) The Court reasoned that "[a]lthough proper authorities may later determine that youths should remain incarcerated for their natural lives, the state may not deprive them at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future." (*Ibid.*) The Court urged the Legislature to address the issue by enacting legislation to establish a parole procedure to permit juvenile defendants

serving a de facto LWOP term for nonhomicide crimes to have an opportunity to obtain release upon a showing of rehabilitation and maturity. (*Id.* at p. 269, fn. 5.) The *Caballero* court declined to consider the question of whether de facto life sentences for juveniles in homicide cases violate the Eighth Amendment. (*Id.* at p. 268, fn. 4.)

The Legislature responded to our Supreme Court's suggestion in *Caballero* to enact legislation establishing a parole eligibility mechanism providing juvenile offenders who are committed to state prison with an opportunity for release. (See § 3051, added by Stats. 2013, ch. 312, § 4 (Sen. Bill No. 260 (2013–2014 Reg. Sess.)) (Senate Bill No. 260).) It "recognize[d] that youthfulness both lessens a juvenile's moral culpability and enhances the prospect that, as a youth matures into an adult and neurological development occurs, these individuals can become contributing members of society. The purpose of this act is to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity, in accordance with [*Caballero*] and the decisions of the United States Supreme Court in [*Graham*] and [*Miller*]. . . . It is the intent of the Legislature to create a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release established." (Stats. 2013, ch. 312, § 1, pp. 2–3.)

Section 3051 hence provides that "any prisoner who was under 23 years of age at the time of his or her controlling offense" shall be provided a "[a] youth offender parole hearing . . . for the purpose of reviewing the [prisoner's] parole suitability." (§ 3051, subd. (a)(1); and see § 3046, subd. (c).) "A person who was convicted of a controlling offense that was committed before the person had attained 23 years of age and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing . . . ." (§ 3051, subd. (b)(3).) At that hearing, the Board of Parole Hearings (the Board) "shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." (§ 4801, subd. (c).)

In our original opinion, we concluded defendant's sentence was the equivalent of LWOP and that defendant was entitled to a new sentencing hearing. Our Supreme Court's recent decision in *Franklin*, however, compels the conclusion that defendant's constitutional challenge to his sentence is moot.

The defendant in *Franklin* was 16 years old when he shot and killed another teenager. (*Franklin, supra,* 63 Cal.4th at p. 268.) He was convicted of first degree murder with a personal firearm-discharge enhancement, and the trial court imposed the statutorily mandated sentence of two consecutive 25-year-to-life sentences. (*Ibid*.) The defendant challenged his sentence under *Miller, supra,* 567 U.S. 460 [132 S.Ct. 2455], on the ground it was the functional equivalent of an LWOP sentence for a juvenile offender and therefore violated the Eighth Amendment to the federal constitution. (*Franklin,* 63 Cal.4th at p. 268.)

The high court held in *Franklin* that the defendant's constitutional challenge was rendered moot by the passage of Senate Bill No. 260, which became effective January 1, 2014. (*Franklin, supra,* 63 Cal.4th at pp. 276–280.) The court explained that "[a]t the heart of Senate Bill No. 260 was the addition of section 3051, which requires the Board to conduct a 'youth offender parole hearing' during the 15th, 20th, or 25th year of a juvenile offender's incarceration. (§ 3051, subd. (b).) The date of the hearing depends on the offender's ' "[c]ontrolling offense," ' which is defined as 'the offense or enhancement for which any sentencing court imposed the longest term of imprisonment.' (*Id*., subd. (a)(2)(B).) A juvenile offender whose controlling offense carries a term of 25 years to life or greater is 'eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions.' (*Id*., subd. (b)(3).)" (*Franklin,* 63 Cal.4th at p. 277.) This statutory scheme "reflects the Legislature's judgment that 25 years is the maximum amount of time that a juvenile offender may serve before becoming eligible for parole. . . . The statute establishes what is, in the Legislature's view, the appropriate time to determine whether a juvenile offender has 'rehabilitated and gained maturity' (Stats. 2013, ch. 312, § 1) so

that he or she may have 'a meaningful opportunity to obtain release' (§ 3051, subd. (e))." (*Id*. at p. 278.)

The *Franklin* court concluded that "section 3051 has changed the manner in which the juvenile offender's original sentence operates by capping the number of years that he or she may be imprisoned before becoming eligible for release on parole. The Legislature has effected this change by operation of law, with no additional resentencing procedure required. [Citation.]" (*Franklin*, *supra*, 63 Cal.4th at pp. 278–279.) The effect of Senate Bill No. 260 was that the *Franklin* defendant was serving a life sentence with a meaningful opportunity for parole during his 25th year of incarceration, when he would be 41 years old, a sentence that was not the functional equivalent of LWOP. (*Id.* at pp. 279–280.) Thus, our high court ruled, "[t]he Legislature's enactment of Senate Bill No. 260 has rendered moot [defendant's] challenge to his original sentence under *Miller*." (*Id*. at p. 280.)

Finally, our Supreme Court concluded that, although the *Franklin* defendant's *Miller* claim was moot, it was not clear whether he "had sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing." (*Franklin*, *supra*, 63 Cal.4th at p. 284.) Thus, although the defendant would not be resentenced, the court remanded the matter to the trial court to determine whether he "was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing." (*Ibid.*) The court explained: "If the trial court determines that [defendant] did not have sufficient opportunity, then the court may receive submissions and, if appropriate, testimony pursuant to procedures set forth in section 1204 and rule 4.437 of the California Rules of Court, and subject to the rules of evidence. [Defendant] may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors. The goal of any such proceeding is to provide an opportunity for the parties to make an accurate record of

the juvenile offender's characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to 'give great weight to' youth-related factors (§ 4801, subd. (c)) in determining whether the offender is 'fit to rejoin society' despite having committed a serious crime 'while he was a child in the eyes of the law' [citation]." (*Ibid*.)

As we did in our original opinion, we conclude that defendant's original sentence of 49 years to life was the functional equivalent of LWOP. However, following *Franklin*, we conclude that defendant's claim that the trial court failed to consider the *Miller* factors has been rendered moot by the enactment of Senate Bill No. 260, under which defendant now has a statutory right to become eligible for release on parole after serving no more than 25 years of his sentence. (§ 3051.)

We also conclude that, as in *Franklin*, defendant here is entitled to a limited remand. Neither *Miller* nor *Caballero* had been decided at the time at the time of defendant's sentencing hearing, and we cannot determine whether defendant had sufficient opportunity to place on the record the sort of information that will be relevant at a youth offender parole hearing under sections 3051 and 4801. (*Franklin*, *supra*, 63 Cal.4th at p. 284.)

C. Proposition 57

Defendant petitioned for rehearing on the ground that an initiative measure recently passed by the voters, "The Public Safety and Rehabilitation Act of 2016," commonly known as Proposition 57, applies retroactively to this case. We granted the petition for rehearing in order to consider this issue.

As relevant to this case, Proposition 57 eliminated the ability of a prosecuting attorney to file charges directly against a juvenile offender in adult court; instead, the People are authorized to file "a motion to transfer the minor from juvenile court to a court of criminal jurisdiction." (Welf. & Inst. Code, § 707, subd. (a)(1).) Upon receiving such a motion, the juvenile court determines whether the minor should be transferred to adult court based on certain statutorily factors. (Welf. & Inst. Code, § 707, subd. (a)(2); *People v. Superior Court* (*Lara*) (2017) 9 Cal.App.5th 753, 758; *People v. Cervantes*

(2017) 9 Cal.App.5th 569, 595-597 (*Cervantes*).) These factors include the minor's degree of criminal sophistication, giving weight to the minor's age, maturity, intellectual capacity, physical, mental, and emotional health, and impetuosity, and the effect of familial, adult, or peer pressure; the minor's potential for rehabilitation before expiration of the juvenile court's jurisdiction; the minor's previous delinquent history and previous efforts to rehabilitate the minor; and the circumstances and gravity of the offense. (Welf. & Inst. Code, § 707, subd. (a)(2)(A)-(E).)

Defendant argues that Proposition 57's requirement that a case against a minor be brought first in juvenile court and transferred to "a court of criminal jurisdiction," or adult court, applies retroactively because it acts as a reduction in punishment. He therefore asks us to remand the matter for a fitness hearing at which the juvenile court would make a detailed assessment of the statutory factors.[8] He relies on *In re Estrada* (1965) 63 Cal.2d 740, 742 (*Estrada*), which held that when a criminal statute is amended "after the prohibited act is committed, but before final judgment, by mitigating the punishment," the punishment provided by the amended statute should be imposed. This holding was based on the court's conclusion that "[w]hen the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply." (*Id.* at p. 745.) Defendant argues that Proposition 57 effects a reduction in punishment and is subject to the rule of *Estrada*.

This division recently rejected the argument that the rule of *Estrada* should apply so as to make Proposition 57's requirement for a fitness hearing retroactive. In

[8] The Attorney General argues this issue is moot because defendant did in fact receive a fitness hearing before his case was transferred to adult court. Regardless of whether the issue is technically moot, we shall exercise our discretion to consider it on the merits.

Cervantes, this division explained that later Supreme Court cases "have limited *Estrada's* retroactivity exception to statutory changes that mitigate the penalty for a particular crime, which is not true of Prop 57." (*Cervantes, supra*, 9 Cal.App.5th at p. 600.) Our Supreme Court in *People v. Brown* (2012) 54 Cal.4th 314, 324, explained that "*Estrada* is today properly understood, not as weakening or modifying the default rule of prospective operation codified in section 3 [of the Penal Code],[9] but rather as informing the rule's application in a specific context by articulating the reasonable presumption that a legislative act mitigating the punishment for *a particular criminal offense* is intended to apply to all nonfinal judgments. [Citation.]" (Italics added.) Applying this rule, the high court concluded that a statute increasing the rate at which prisoners could earn credit for good behavior should not be applied retroactively because it did not "represent a judgment about the needs of the criminal law with respect to a particular criminal offense." (*Id*. at p. 325.)

In *Cervantes*, this division "[found] the rationale underlying *Estrada* equally inapplicable to the procedural changes implemented by Prop 57." (*Cervantes, supra*, 9 Cal.App.5th at p. 601.) Although Proposition 57 will affect time spent in custody in some cases, it does not directly mitigate the penalty for a particular crime as required for retroactivity under *Estrada*. (*Cervantes*, at pp. 601-602; accord *People v. Mendoza* (2017) ___ Cal.App.5th ___, ___ [2017 Cal.App. LEXIS 287, *38-39].)[10] We remain of the view that the pertinent portions of Proposition 57 should not be applied retroactively. We therefore reject defendant's contention that he is entitled to have this matter remanded for a fitness hearing pursuant to Proposition 57. For the reasons discussed in *Cervantes*, we also reject defendant's contention that this result deprives him of his constitutional right to equal protection. (*Cervantes, supra*, 9 Cal.App.5th at p. 598, fn.

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[9] Section 3 provides: "No part of [the Penal Code] is retroactive, unless expressly so declared."

[10] In *Cervantes*, this division remanded the matter for partial retrial; in those circumstances, the defendant was entitled to a fitness hearing on remand. (*Cervantes, supra*, 9 Cal.App.5th at p. 580.)

38; see also *Mendoza, supra*, ___ Cal.App.5th at p. ___ [2017 Cal.App. LEXIS 287, *43-47].)

III. DISPOSITION

Our September 30, 2014 decision is vacated. The judgment and defendant's sentence are affirmed. The matter is remanded to the trial court for the limited purpose of determining whether defendant "was afforded an adequate opportunity to make a record of information that will be relevant to the Board as it fulfills its statutory obligations under sections 3051 and 4801." (*Franklin*, *supra*, 63 Cal.4th at pp. 286–287.)

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Rivera, J.

We concur:

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Ruvolo, P.J.

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Streeter, J.